

Artist Rights Institute

where artists speak

By email

March 15, 2025

Office of Science and Technology Policy
2415 Eisenhower Avenue
Alexandria, VA 22314
Attention: Faisal D'Souza, NCO

Re: National Science Foundation (OCTP) Request for Information on the Development of an Artificial Intelligence (AI) Action Plan

Gentlepersons:

We appreciate the opportunity to comment on the National Science Foundation's Artificial Intelligence Action Plan. The Artist Rights Institute¹ is based in Austin, Texas and was founded in 2023 by Dr. David Lowery of the University of Georgia at Athens and Austin music attorney Christian L. Castle to further the study and discussion of artist rights. We sponsor the annual Artist Rights Symposium (most recently held at American University), produce the ArtistRightsWatch.com blog and are frequent participants in the artist rights public policy debate.

Where's the Omelet?

At the outset, we ask the Foundation to entertain, if not embrace, a simple concept: Copyright is not a "regulation" any more than human rights are a "regulation." We do not speak of war criminals as violating regulations; we speak of them as committing crimes against humanity.

Protecting human expression is not mere "regulation." Such protections are fundamental and not just a line of code that keeps the humans quiet while commerce is done by the machines such as "robots.txt". Human expression is enshrined and protected in human rights documents that have rarely been as important to humanity as they are today.

Respectfully, it is protecting this expression as one of the most human of human attributes that the Foundation, and indeed, America itself, is about in today's proceeding.

¹ The Institute's website is www.artistrights institute.org and the latest Symposium is available at <https://www.youtube.com/watch?v=4evUMghxhE&list=PLwhx9YekO73838rCheUEWdGvhoZv1AXRf>

Artist Rights Institute

9600 Great Hills Trail, Suite 150 West | Austin, Texas | 78759
Phone +1 (512) 231-2213 | Fax +1 (512) 519-2529

www.artistrights institute.org

For example, the Universal Declaration of Human Rights recognizes the fundamental truth of the human rights of creators: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”² This basic principle of authorship in the Declaration resonates in a host of other human rights documents.³

In the rush to embrace AI, restrictions placed on mass digitization and ingestion of works of human expression into AI data factories is often viewed negatively as juxtaposed to “innovation.” Big Tech militates against “regulations” as blocking the proliferation of “innovation.”

This is particularly true if protecting human expression slows down the mad rush to stand entire economies upside down solely for the benefit of the massively financed artificial intelligence cabal. It is not mere “regulation” if our government requires AI companies to respect copyright and related creator rights from baby pictures on Facebook to classics of American culture.

² United Nations, Universal Declaration of Human Rights (General Assembly Resolution 217 A) Art. 27, par. 2 (Dec. 10, 1948) (emphasis added). See also generally Christian Castle, Artist Rights are Human Rights, Medium (Sept. 27, 2015) available at <https://medium.com/@MusicTechPolicy/artist-rights-are-human-rights-dddb0fe194c8> (“The human rights of artists is a different concept from intellectual property rights, such as copyright. Intellectual property rights are created by national laws, and the human rights of artists are recognized as the fundamental rights of all persons by all of the central human rights documents to which hundreds of countries have agreed....It is important to remember that human rights are fundamental, inalienable, and universal entitlements belonging to individuals, individual artists [and performers] in our case. As a legal matter, human rights can be distinguished from intellectual property rights. Intellectual property rights are arguably subordinate to human rights and actually implement at the national level the very human rights recognized as transcending international and national intellectual property laws.”).

³ See, e.g., United Nations, *International Covenant on Economic, Social and Cultural Rights* (General Assembly resolution 2200A (XXI)) (Dec. 16, 1966) Article 15, par. 1 (c) (“The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.”)(emphasis added); *American Declaration of the Rights and Duties of Man* (Inter-American Commission on Human Rights) (1948) Article 13, par. 2 (“Every person has the right...to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author”); Department of International Law (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* “Protocol of San Salvador”, Article 14, par. 1 (c) (“The States Parties to this Protocol recognize the right of everyone...[t]o benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author”); and Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (Treaty ETS 5), Article 1 Protocol No. 1 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”).

Confounding “innovation” and humanity is readily apparent in the submissions of OpenAI⁴ and Google⁵ in the RFI, two prime canons of Silicon Valley’s doublethink at its most Orwellian as we will discuss below.

We respectfully wish to emphasize to the Foundation that if government waives a magic wand and supports Silicon Valley’s heartbreaking failure to respect human expression in obeisance to a contorted and idealized canon of “innovation” that incantation would simply be a taking by another name. That taking would tell Americans their elected government made rules that forgave a data-starved beast, new laws promoted by the beneficiaries of the very rules the beast would like to make for itself. That taking would facilitate what may become one of the largest generational wealth transfers in human history and violates *fundamental* principles protected by the Constitution.⁶ Such a legislative shockwave would cut a cataclysmic swath that would reverberate in the hearts of the people for generations.

There is some evidence that Silicon Valley elites are colluding to accomplish that very purpose. We come to be in the Foundation’s RFI because of President Biden’s extensive executive order on AI⁷ now revoked by President Trump. Google’s former executive chairman, Eric Schmidt, illuminates how Executive Order 14110 came to exist as a direct witness and participant.

Speaking at the *Axios AI+ Summit* conference in Washington DC⁸ on November 28, 2023, Mr. Schmidt said (emphasis added):

⁴ OpenAI, *Response to the National Science Foundation’s and Office of Science & Technology Policy’s Request for Information on the Development of an Artificial Intelligence (AI) Action Plan*, NAT. SCI. FOUND. Docket No. NSF_FRDOC_0001 (Mar. 13, 2025) available at <https://cdn.openai.com/global-affairs/ostp-rfi/ec680b75-d539-4653-b297-8bcf6e5f7686/openai-response-ostp-nsf-rfi-notice-request-for-information-on-the-development-of-an-artificial-intelligence-ai-action-plan.pdf> hereafter “OpenAI filing.”

⁵ Google, *Response to the National Science Foundation’s and Office of Science & Technology Policy’s Request for Information on the Development of an Artificial Intelligence (AI) Action Plan*, NAT. SCI. FOUND. Docket No. NSF_FRDOC_0001 (Mar. 13, 2025) hereafter “Google filing.”

⁶ John Locke, *SECOND TREATISE OF GOVERNMENT* (1689) at *Chapter XIX. Of the Dissolution of Government*, par. 222. (“...[W]henever the legislators endeavor to take away and destroy the property of the people...they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever therefore the legislative shall transgress this fundamental rule of society; and either by ambition, fear, folly or corruption, endeavor to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people; by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends.”)

⁷ President Joseph R. Biden, Executive Order 14110 *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (October 30, 2023) available at <https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence>

⁸ *Axios AI+ Summit*, available at <https://www.youtube.com/watch?v=8w-betyOjxU>

The tech people along with myself have been meeting for about a year [2022-2023]. The narrative goes something like this: We are moving well past regulatory or government understanding of what is possible, **we accept that**.

Strangely...this is the first time that the senior leaders who are engineers have basically said that they **want** regulation, but we want it in the following ways...which as you know never works in Washington [unless you can write an Executive Order and get the President to sign it]....**So far we are on a win, the taste of winning is there**. If you look at the UK event which I was part of [the AI Safety Summit held at Bletchley Park on 1 Nov. 2023], **the UK government took the bait [being the “bait” that the Schmidt cabal had already fed to the US government]**, took the ideas, decided to lead, they’re very good at this, and they came out with very sensible guidelines.

Because the US and UK have worked really well together—there’s a group within the National Security Council here that is particularly good at this, and they got it right, and that produced [Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence] which is I think is the longest EO in history, that says all aspects of our government are to be organized around [concessions to Mr. Schmidt’s confederates among the unnamed “tech people”].

In other words, Eric Schmidt and his confederates colluded to draft an executive order they got signed by the President of the United States through their political clout. But it doesn’t stop there. Mr. Schmidt then used President Biden’s Executive Order as what he called “bait” to deceive the Prime Minister of the United Kingdom. And then he had the brass to publicly brag about it smugly to the press at the Axios conference. Why so smug? He bragged because he knew no one would stop him and that he’d get away with it. And so far he was correct. Unlike the current RFI, the public was not involved in drafting Executive Order 14110, so we are grateful for the opportunity to participate in this RFI and the transparency of the Foundation in seeking public comment.

Google and Its Confederates Want Retroactive Absolution Wrapped in the American Flag

It is crucial for policymakers to have a clear understanding of where we are today with respect to the collision between AI and artist rights, including copyright. The corrosion of artist rights by the richest corporations in commercial history is not something that may happen in the future. *Massive infringement has already occurred, is occurring this minute, and will continue to occur into the future at an increasing rate.* Companies like Google would have you believe that some vague “balancing” should be adopted in the future,⁹ but the reality—the truth—is

⁹ Google filing at 5.

that Google and its confederates have already done the balancing act. Google put its adjudicated monopolist's big thumb on that scale in its own favor, which is as surprising as gambling at Rick's Café Américain.

Depending on how far back one focuses, massive infringement appears to have been part of the plan that started with Google Books now twenty years ago. As the tech historian George Dyson observed in 2005 after a trip to the Googleplex during the Google Books digitization craze:

*My visit to Google? Despite the whimsical furniture and other toys, I felt I was entering a 14th-century cathedral—not in the 14th century but in the 12th century, while it was being built. Everyone was busy carving one stone here and another stone there, with some invisible architect getting everything to fit. The mood was playful, yet there was a palpable reverence in the air. **"We are not scanning all those books to be read by people," explained one of my hosts after my talk. "We are scanning them to be read by an AI."***¹⁰

Google's plan¹¹ with Google Books was likely no different than the company's plan for AI—seek forgiveness through deception, not permission. Or better yet, seek retroactive absolution by litigation or legislation. And just like the company did in 2005, they want you to believe that their massive infringement is not a crime, it's about "innovation" versus "regulation," except this time it's all wrapped up in the American flag. It's not stealing, it's the "AI gap." And what red-blooded American could be against stopping China in the AI race because China ignores copyright. And we should be just like them.

¹⁰ George Dyson, Conversation: Technology (Oct. 23, 2005) available at https://www.edge.org/conversation/george_dyson-turings-cathedral

¹¹ Arguably, the Google Books case (*Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015)) did not address using the Google Books corpus for AI training as a permitted non-display use. Maybe it should have. Google Books played a significant role in Google's AI development, particularly in the early stages. By digitizing millions of books, Google created a vast dataset that was instrumental in training natural language processing (NLP) models. This initiative helped Google refine its search algorithms, improve language understanding, and develop tools like Google Translate. Google's NLP training draws from a variety of sources, including publicly available datasets and proprietary data. For example, Google's BERT model was pre-trained using large text corpora like Wikipedia and other publicly available datasets. Of course, Google's use of Wikipedia in its AI likely violates the Creative Commons Attribution-ShareAlike 3.0 Unported License (CC BY-SA 3.0) used by Wikipedia. Google has contributed to Wikipedia and its related entities in various ways. For instance, Google has provided financial support to the Wikimedia Foundation, which operates Wikipedia. In 2010, Google donated \$2 million to the foundation, and in 2019, it contributed an additional \$3 million. Moreover, Google and Wikimedia Enterprise began a partnership in 2021. This collaboration allows Google to access Wikimedia's content more efficiently for its services, such as search results and knowledge panel. Wikipedia has never made a claim against Google for violating its terms of use and likely will never make such a claim.

OpenAI's filing reveals this backwards thinking. They tell the Foundation is not that China fails to respect human expression, *it's that China fails to protect AI training*. "Today, CCP-controlled China has a number of strategic advantages, including...[i]ts ability to benefit from copyright arbitrage being created by democratic nations that do not clearly protect AI training by statute, like the US, or that reduce the amount of training data through an opt-out regime for copyright holders, like the EU."¹² Yes, the "copyright arbitrage" is not that the US offers greater protection for human expression, it's that the US fails to protect the machines enough.

And the cherry on top is that OpenAI misleads¹³ the Foundation by citing to the EU's highly controversial "opt-out" regime. That regime is not long for this world and likely violates the Berne Convention's prohibition on formalities for starters.¹⁴ Similar prohibitions are included in other international treaties to which the US, UK and EU are parties which makes OpenAI's misleading assertion even more odious.¹⁵ A separate opt-out regime has been rejected by thousands of commenters in the UK IPO consultation on the Government's highly controversial "Data (Use and Access) Bill"¹⁶ that drew thousands of comments in opposition and which failed miserably in the House of Lords.

Both Google and OpenAI would wrap themselves in the American flag in their appeal to jingoistic imagery of Silicon Valley fighting the good fight for American innovation against the Chinese Communist Party. Given the commercial history of Silicon Valley and the People's

¹² OpenAI filing at 4.

¹³ Indeed, see Jennifer Rankin, *EU accused of leaving 'devastating' copyright loophole in AI Act*, THE GUARDIAN (Feb. 19, 2025) available at <https://www.theguardian.com/technology/2025/feb/19/eu-accused-of-leaving-devastating-copyright-loophole-in-ai-act> ("Axel Voss, a German centre-right member of the European parliament, who played a key role in writing the EU's 2019 copyright directive, said that law was not conceived to deal with generative AI models: systems that can generate text, images or music with a simple text prompt.")

¹⁴ See *Berne Convention for the Protection of Literary and Artistic Works* art. 5(2), Sept. 28, 1979, S. Treaty Doc. No. 99-27.

¹⁵ See, e.g., *Agreement on Trade-Related Aspects of Intellectual Property* art. 9(1), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS] ("Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."); *WIPO Copyright Treaty* art. 1(4), Dec. 20, 1996, 2186 U.N.T.S. 121 (extending protection to computer programs and databases: "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."); *WIPO Performances and Phonograms Treaty* art. 20, Dec. 20, 1996, 2186 U.N.T.S. 203 (extending protection to sound recordings and certain performances: "The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality."); see also *Beijing Treaty on Audiovisual Performances* art. 17, June 24, 2012, 51 I.L.M. 1214 (extending protection to audiovisual fixations of performances and certain unfixed performances: "The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.").

¹⁶ Available at <https://bills.parliament.uk/bills/3825>.

Republic of China,¹⁷ their buy-American bromides make for interesting reading if you can see past the oozing irony. And the hypocrisy.

This commercial jingo is nothing new. A highlight of the classic American musical *Lil' Abner*¹⁸ is the song "[w]hat's good for General Bullmoose is good for the USA."¹⁹ The song uses the character "Bashington T. Bullmoose" to parody former General Motors' president Charles Wilson who told the Senate Armed Services Committee that "What is good for the country is good for General Motors."²⁰ The statements by OpenAI, Google and we expect many others to the Foundation that respecting copyright will create an "AI gap" and impede the U.S. in the "AI race" will go down in history with these risible statements by Bullmoose (and Wilson)—unless the AI rewrites the history. For now, let us savor the irony while we still can.

It must also be said that wherever the Foundation ends up on protection of artist rights for America's AI Action Plan, the tech giants will likely view that position as a starting place for erosion, even if they get exactly what they want from the U.S. government. This is certainly the position they have taken with other safe harbor abuse such as the "DMCA" safe harbor.²¹ As the Copyright Alliance testified to Congress in 2020:

The primary problem is that section 512 has been so misinterpreted by the courts [in litigation brought by copyright owners trying to use the DMCA for what they thought was its intended purpose] **that service providers have little risk and need only do the absolute**

¹⁷ See, e.g., Cheang Ming, *Google is blocked in China, but that's not stopping it from opening an A.I. center there*, CNBC (Dec. 13, 2017) available at <https://www.cnbc.com/2017/12/13/alphabets-google-opens-china-ai-centre.html>. Google opened an AI research center in Beijing in 2017, focusing on natural language processing and machine learning. This center aimed to tap into China's talent pool and contribute to Google's AI advancements. Microsoft has a significant footprint in China, including its AI and Research division. The company operates research labs in Beijing and Shanghai, which have contributed to advancements in computer vision, speech recognition, and natural language understanding. Microsoft's Azure cloud platform is also available in China through a partnership with 21Vianet, a local data center operator. This collaboration allows Microsoft to comply with Chinese regulations while providing AI and cloud services to local businesses. IBM has been active in China for decades, with its Watson AI platform playing a key role in the company's PRC operations. NVIDIA has a strong presence in China. Its GPUs are widely used by Chinese tech companies for AI training and deployment. NVIDIA has also partnered with local firms to develop AI applications in areas such as autonomous driving and smart cities. Apple has integrated AI into its products and services, such as Siri and facial recognition technology. The company relies heavily on China for manufacturing and has invested in local R&D centers.

¹⁸ *Lil' Abner* (1956), book by Norman Panama and Melvin Frank, based on the comic by Al Capp.

¹⁹ Music by Johnny Mercer and Lyrics by Gene De Paul.

²⁰ Charles Erwin Wilson, *Confirmation of Charles Erwin Wilson as Secretary of Defense*, SENATE ARMED SERVICES COMMITTEE (Jan. 14, 1953).

²¹ 17 U.S.C. §512.

minimum required under the DMCA. All the while, copyright owners are being devastated by online infringement.²²

Will You Believe Them or Your Own Eyes?

In any discussion about copyright and artificial intelligence, the credibility of the witnesses is crucial. Under the banner of innovative AI training, the richest companies with the most powerful lobbyists and lawyers have already engaged in an organized and massive copyright infringement on a scale that we have never seen in the history of mankind.

Yet the filings of OpenAI and Google in this proceeding dance around admitting what they have already done. Let us turn to statements of an expert with actual knowledge, Mr. Elon Musk.²³ Mr. Musk was interviewed in 2023 by the well-known New York Times business reporter Andrew Ross Sorkin for Mr. Sorkin's *Deal Book Summit*.²⁴ Mr. Sorkin asked Mr. Musk a question about copyright and AI which drew a reply relevant to today's proceedings—a reply which no one has denied that we are aware of.

SORKIN

Can I ask you an interesting IP issue...one of the things about training on data is the idea that these things are not being trained on peoples copyrighted information historically, that's been the concept.

MUSK

That's a huge lie.

²² Copyright Alliance CEO Keith Kupferschmid, Senate Judiciary Intellectual Property Subcommittee, *The Role of Private Agreements and Existing Technology in Curbing Online Piracy* (Dec. 15, 2020) available at <https://files.constantcontact.com/d2e8d4e5501/cfec37f5-261e-4c6d-a19e-335a2d52e258.pdf>

²³ Elon Musk was one of the co-founders of OpenAI in 2015 and initially contributed funding, but he left the organization in 2018 due to disagreements over its direction. Since then, Musk has not been involved in OpenAI's operations or ownership. In fact, he has been critical of OpenAI's transition to a for-profit model and its alignment with Microsoft as a major investor.

²⁴ New York Times Events, Deal Book Summit (Nov. 29, 2023) at 56 available at <https://youtu.be/2BfMuHDfGJI?t=3337>

SORKIN

Say that again?

MUSK

These AIs are all trained on copyrighted data, obviously.

SORKIN

So you think it's a lie when OpenAI says...none of these guys say they are training on copyrighted data?

MUSK

That's a lie.

SORKIN

A straight up lie.

MUSK

A straight up lie. 100%. Obviously it's been trained on copyrighted data.

There's only one certain way to get away with massive, knowing, intentional copyright infringement—convince the government to make legal that which was previously illegal.²⁵ Which explains why Google and OpenAI (and probably others) want yet another copyright exception.

If anything, we think that the AI platforms (many of the same companies as Google that manipulate the DMCA safe harbor to this day) will show even less interest in cooperating with rights owners (or as Google calls us, the “data holders”²⁶) due to the purported “AI gap.” OpenAI and Google's tactics in AI is the latest in Google's long-term strategy to use its market dominance and overwhelming commercial power to continually distort copyright exceptions, thereby

²⁵ See, e.g., *The Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, H.R. 1551, Public Law 115–264, 132 Stat. 3676 (2018).

²⁶ Google filing at 5.

artificially depressing the market price of copyrighted works. Google's proposed outcome would be yet another distortion.

Big Tech's Greedy Own Goal on Licensing and Metadata

There no doubt will be a discussion of licensing for AI training. We have been through this once before with illegal p2p file sharing when tech companies rushed to offer CD ripping software that completely ignored the existing digital rights management tools of the day, especially the International Standard Recording Codes. ISRCs were printed in the PQ data of likely every CD as many CD duplicators would not fill an order that was missing the ISRCs. Consequently, while CDs carried a lot of metadata with them, CD rippers called out to CDDb (subsequently Gracenote) to populate track titles in playback software. CDDb returned track name, artist name, timing, but not the ISRC—the one field necessary to ultimately identify the copyright owner and make payments as is the practice today.

Companies like Google have a mystique that they can solve any tech problem—even the ones they create themselves. This is dubious. The last time Google created a problem like the mishmash of AI was Google Books, which was (and is) as the information science scholar Geoffrey Nunberg put it succinctly, a “disaster for scholars.”²⁷

However, it should be easy to see that Big Tech likely do not *want* to solve the metadata catastrophe they have created although it does suggest an alternative explanation for why there was such a fascination with “remix culture” among academics that Google has supported, Creative Commons (which likely contributes substantially to AI databases in breach of attribution requirements), nonprofits like the Electronic Frontier Foundation, and, of course, YouTube.

Like p2p file sharing platforms that drove many aspects of the Internet like broadband, search and advertising, AI platforms need to create such a big mess that it is very difficult to undo in hopes that lawmakers will let them get away with it through another safe harbor or compulsory license. Since many of the same players are involved with AI that profited from Internet piracy, they are, as the Rolling Stones might say, practiced in the art of deception.

A compulsory license is just a safe harbor by another name. Even if one could get past the metadata crisis that AI platforms have created to know whom to pay, rate setting will be just another feast for Big Tech's lobbyists and lawyers. As we have seen with the rapidly failing Copyright Royalty Board rate setting process under the compulsory license for songs,²⁸ Big Tech simply piles up the lawyers against creators in the now-familiar flood the zone tactic of lawfare

²⁷ Geoffrey Nunberg, *Google's Book Search: A Disaster for Scholars*, CHRON. OF HIGHER EDU. (August 31, 2009); see also Jean-Noël Jeanneney, *Google and the Myth of Universal Knowledge: A View from Europe* (2007).

²⁸ 17 U.S.C. §115.

(25:1 in the case of the Phonorecords IV proceeding²⁹).

The Delay's the Thing

We again ask the Foundation to embrace the issue of timing because we know what they say about justice delayed. However antithetical, copyright and AI must be discussed together for a very specific reason: Artificial intelligence platforms operated by Google, Microsoft/OpenAI, Meta and the like have scraped and ingested works of authorship from baby pictures to Sir Paul McCartney as fast and as secretly as possible. And the AI platforms know that the longer they can delay accountability, the more of the world's culture they will have devoured—or as they might say, the more data they will have ingested. For the good of humanity, of course.

As the Hon. Alison Hume, MP recently told the UK Parliament during the debate over the UK's AI legislation, this theft is massive *and has already happened*:

This week, I discovered that the subtitles from one of my episodes of *New Tricks* have been scraped and are being used to create learning materials for artificial intelligence. Along with thousands of other films and television shows, my original work is being used by generative AI to write scripts which one day may replace versions produced by mere humans like me.

This is theft, and it's happening on an industrial scale. As the law stands, artificial intelligence companies don't have to be transparent about what they are stealing.³⁰

Any delay³¹ in prosecuting AI platforms simply increases their *de facto* "text and data mining" safe harbor while they scrape ever more of world culture. As Ms. Hume states, this massive

²⁹ Copyright Royalty Board, *Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV) 21-CRB-001PR (2023-2027)*

³⁰ Paul Revoir, *AI companies are committing 'theft' on an 'industrial scale', claims Labour MP - who has written for TV series including New Tricks*, DAILY MAIL (Feb. 12, 2025) available at <https://www.dailymail.co.uk/news/article-14391519/AI-companies-committing-theft-industrial-scale-claims-Labour-MP-wrote-TV-shows-including-New-Tricks.html>

³¹ See, e.g., Kerry Muzzey, [YouTube Delay Tactics with DMCA Notices], Twitter (Feb. 13, 2020) available at <https://twitter.com/kerrymuzzey/status/1228128311181578240> (Film composer with Content ID account notes "I have a takedown pending against a heavily-monetized YouTube channel w/a music asset that's been fine & in use for 7 yrs & 6 days. Suddenly today, in making this takedown, YT decides "there's a problem w/my metadata on this piece." There's no problem w/my metadata tho. This is the exact same delay tactic they threw in my way every single time I applied takedowns against broadcast networks w/monetized YT channels....And I attached a copy of my copyright registration as proof that it's just fine."); Zoë Keating, [Content ID secret rules], Twitter (Feb. 6, 2020) available at <https://twitter.com/zoecello/status/1225497449269284864> (Independent artist with Content ID account states "[YouTube's Content ID] doesn't find every video, or maybe it does but then it has selective, secret rules about what it ultimately claims for me.").

“training” has transferred generational wealth to these data-hungry mechanical beasts to a degree that confounds human understanding of its industrial scale infringement. Once again Big Tech has linked other people’s property and their commerce for even greater profit on the Internet of Other People’s Things.

The longer AI companies can make governments “take the bait” and chase their tails with the “regulation vs. innovation” game, the more infringement can occur. The more infringement occurs, the harder it will be to undo it—and *this is the whole point*. We have seen this movie before and we know how it ends. It is essentially the story of Internet piracy which followed the same playbook.

This is not a guess—many publications have reported the mass infringement and litigation has demonstrated through discovery and cross-examination that intentional and carefully planned mass infringement has been underway for years.³² AI platforms know they are infringing and they do so intentionally. Like massive Internet piracy which involved some of the same players for years, the platforms have two hopes which are not mutually exclusive: Steal so much that only the biggest plaintiffs can afford to sue, and then hope that they can lobby their way to a retroactive safe harbor. The current RFI is just such an exercise. It is the same old song: Big Tech would far rather seek forgiveness than permission.

Faux “Data Mining” is the Key that Picks the Lock of Human Expression

We strongly disagree that all the world’s culture can be squeezed through the keyhole of “data” to be “mined” as a matter of legal definitions. In fact, a recent study by leading European scholars have found that data mining exceptions were never intended to excuse copyright infringement.³³

Accordingly, we believe that culture and data must be separated by a bright line. That bright line precludes distorting any “text and data mining” exceptions to copyright or any “compulsory license” that takes control of works of authorship away from authors and their designees.

³² Cade Metz, Cecilia Kang, Sheera Frenkel, Stuart A. Thompson and Nico Grant, “How Tech Giants Cut Corners to Harvest Data for AI,” *New York Times* (April 8, 2024) available at <https://www.nytimes.com/2024/04/06/technology/tech-giants-harvest-data-artificial-intelligence.html> (“Google transcribed YouTube videos to harvest text for its A.I. models, five people with knowledge of the company’s practices said. That potentially violated the copyrights to the videos, which belong to their creators....Google said that its A.I. models “are trained on some YouTube content,” **which was allowed under agreements with YouTube creators**, and that **the company did not use data from office apps outside of an experimental program.**”)

³³ Professor Tim W. Dornis and Professor Sebastian Stober, *Copyright Law and Generative AI Training - Technological and Legal Foundations*, RECHT UND DIGITALISIERUNG/DIGITIZATION AND THE LAW (Dec. 20, 2024)(Abstract) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4946214.

Confounding culture with data to confuse both the public and lawmakers requires a vulpine lust that we haven't seen since the breathless Dot Bomb assault on both copyright and the public financial markets. This lust for data, control and money will drive lobbyists and Big Tech's amen corner to seek copyright exceptions under the banner of "innovation."

Any country that appeases AI platforms in the hope of cashing in on tech at the expense of culture will be appeasing their way towards an inevitable race to the bottom. America should not lead that race.

More countries can be predictably expected to offer ever more accommodating terms in the face of Silicon Valley's army of lobbyists who mean to engage in a lightning strike across the world. The fight for the survival of culture is on. The fight for survival of humanity may literally be the next one up. America should lead that fight, not shrink from it.

Big tech's distortions are far beyond any reasonable definition of "text and data mining." What we can expect is for Big Tech to seek to distract both creators and lawmakers with inapt legal diversions such as trying to pretend that snarfing down all with world's creations is mere "text and data mining". The ensuing delay spent arguing the obvious will allow AI platforms to enlarge their training databases, raise more money, and further the AI narrative as they profit from the delay and capital formation.

A Right Without a Remedy is No Right At All³⁴

Whatever the government decides as a solution really must have some tangible punishment for AI platforms that violate the rules. Given the vast wealth of these AI companies, at least three of which have a market capitalization over \$1 trillion, leaving it up to artists or other citizens to pursue a private right of action for copyright infringement plays directly into the hands of Silicon Valley.

An artist stands a better chance of seeing a thief punished for stealing their car off the street than an AI platform punished for stealing their life's work online. The net effect of this sad situation is that there is essentially no remedy. Because there is no remedy, infringers are incentivized to do more infringement at an even grander scale. That may very well explain the status quo.

³⁴ See Sir William Blackstone, 3 BLACKSTONE'S COMMENTARIES 109 ("[I]t is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."); see also *Marbury v. Madison*, 5 U.S. 137 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury...The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right" Marshall, J. at 163).

Respectfully, the Foundation surely cannot simply ignore the status quo. For artist rights to be meaningful and enforceable, artists must be able to rely on their respective national governments to provide a meaningful mechanism to bring claims and in egregious cases, for the police and government prosecutors to enforce those rights. This need is acute when confronted with companies like Google, Meta, Spotify, Amazon, and others because they each have, in their own way, flaunted the vested legal rights of artists and songwriters and have the resources to take on creators in dozens of lawsuits³⁵ as we have seen repeatedly over the years.³⁶

Why? The explanation for why these giants reportedly have snarfed down mind-bending quantities of the content uploaded to their platforms solely for the purpose of AI “training” is very simple—because they know they can get away with it. They employ their well-practiced propaganda tactic of “flood the zone” with their enablers, the armies of lobbyists, lawyers, nonprofits, and academics in their paid service.

³⁵ See Database of AI Litigation (DAIL), Geo. Wash. Univ. S. of Law available at <https://blogs.gwu.edu/law-eti/ai-litigation-database/>

³⁶ Tim Adams, *Thom Yorke: If I can't enjoy this now, when do I start?* THE GUARDIAN (Feb. 23, 2013) available at <https://www.theguardian.com/music/2013/feb/23/thom-yorke-radiohead-interview> (“[Apple and Google] have to keep commodifying things to keep the share price up, but in doing so they have made all content, including music and newspapers, worthless, in order to make their billions.”)

National Science Foundation
Re: RFI AI Action Plan
March 15, 2025
Page 15

Conclusion

Respectfully, the Foundation should ask itself whether it, too, is “taking the bait” from Big Tech as Mr. Schmidt suggests. Decisive action is required as delay only plays into the hands of Big Tech. Thousands of artists—and voters—are protesting Big Tech’s attempted exploitation of the TDM loophole with the “silent album” project³⁷ as well as vocal protests that will no doubt echo in this RFI.

We again thank the Foundation for hosting this RFI and allowing our submission.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Ch. Castle".

Christian L. Castle
Director
Artist Rights Institute
Austin, Texas

CLC/ko

³⁷ Paul Glynn, *Artists Release Silent Album In Protest Against AI Using Their Work*, BBC (Feb. 25, 2025) available at <https://www.bbc.com/news/articles/cwyd3r62kp5o>